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### Criminal Procedure— Peremptory Challenges after *Purkett v. Elem*, 115 S. Ct. 1769 (1995): How to Judge a Book by Its Cover Without Violating Equal Protection

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CRIMINAL PROCEDURE—PEREMPTORY CHALLENGES AFTER *PURKETT v. ELEM*, 115 S. Ct. 1769 (1995): HOW TO JUDGE A BOOK BY ITS COVER WITHOUT VIOLATING EQUAL PROTECTION.

I. INTRODUCTION

Traditionally, trial lawyers enjoyed the right to strike limited numbers of the venire without cause.<sup>1</sup> A peremptory challenge,<sup>2</sup> as opposed to a challenge for cause,<sup>3</sup> is based on a lawyer's subjective decision that a particular juror will be biased against the result desired by the lawyer in the case at hand.<sup>4</sup> Unfortunately, bias itself often influences the subjectivity of the lawyer and leads to strikes based on certain characteristics of the targeted juror.<sup>5</sup>

*Purkett v. Elem*<sup>6</sup> marks a recent Supreme Court attempt to further define *Batson v. Kentucky*,<sup>7</sup> the Court's landmark decision prohibiting purposeful racial discrimination in jury selection to prevent violation of a criminal defendant's right to equal protection.<sup>8</sup> In *Purkett*, the Court found that a peremptory challenge based on a juror's long, unkempt hair, mustache, and beard satisfied the prosecution's burden of articulating a nondiscriminatory reason for the challenge.<sup>9</sup> The Court reasoned that this step of the *Batson* process does not require a persuasive or even plausible

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1. At early common law, both prosecutors and defendants were allowed to strike jurors from the venire without cause. Alan Raphael, *Discriminatory Jury Selection: Lower Court Implementation of Batson v. Kentucky*, 25 WILLIAMETTE L. REV. 293, 296-97 (1989). So strong was the tradition that despite a 1305 statute requiring prosecutors to show cause for strikes, courts allowed prosecutors to use peremptory challenges through the practice of "standing jurors aside." *Id.* at 297. Thus, peremptory challenges became the law in England and were later adopted by American common law. *Swain v. Alabama*, 380 U.S. 202, 213-16 (1965) (providing a detailed history of the peremptory challenge).

2. Peremptory challenge is defined as the "right to challenge a juror without assigning, or being required to assign a reason for the challenge. In most jurisdictions each party to an action, both civil and criminal, has a specified number of such challenges and after using all his peremptory challenges he is required to furnish a reason for subsequent challenges." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

3. Challenge for cause is defined as a "request from a party to a judge that a certain prospective juror not be allowed to be a member of the jury because of specified causes or reasons." *Id.* at 230.

4. Nancy J. Cutler, J.E.B. v. Alabama Ex Rel. T.B.: *Excellent Ideology, Ineffective Implementation*, 26 ST. MARY'S L.J. 503, 505-06 (1995).

5. *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965) (noting that peremptory challenges are "often exercised upon the sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" [as well as on grounds of] . . . race, religion, nationality, occupation or affiliations of people summoned for jury duty.") (quoting *Lewis v. United States*, 146 U.S. 370, 376 (1892)).

6. 115 S. Ct. 1769 (1995) (per curiam).

7. 476 U.S. 79 (1986).

8. *Elem v. Purkett*, 25 F.3d 679, 682 (8th Cir. 1994).

9. *Purkett*, 115 S. Ct. at 1771.

explanation.<sup>10</sup> Indeed, the reason offered will be deemed race neutral unless the prosecutor's explanation inherently implies a discriminatory intent.<sup>11</sup>

Part two of this note examines the facts and procedural history of the *Purkett* decision, and part three briefly describes the development of peremptory challenges as an area of constitutional scrutiny. Part four analyzes the reasoning of the Supreme Court's decision in *Purkett*, and part five explores the significance of the decision.

## II. FACTS

In July of 1986 a Missouri state court jury convicted Jimmy Elem of second degree robbery.<sup>12</sup> Elem, who is black, objected to the prosecutor's use of peremptory challenges to strike two black males (jurors 22 and 24) from the jury panel.<sup>13</sup> While proffering no authority, Elem presumably based his objection on *Batson v. Kentucky*.<sup>14</sup>

Responding to defense objections to the challenges, the prosecutor first cited hair style as the primary reason for striking juror 22 from the panel.<sup>15</sup> In addition, both jurors 22 and 24 wore mustaches and goatee-type beards which made them look "suspicious" to the prosecutor.<sup>16</sup> The prosecutor further explained that juror 24 was challenged because a man pointed a sawed-off shotgun at him during a supermarket robbery.<sup>17</sup> Because no gun was involved in Elem's case, the prosecutor feared that juror 24 might be unreliable if he felt that a robbery necessarily required a gun.<sup>18</sup>

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10. *Id.*

11. *Id.*

12. *Elem*, 25 F.3d at 680.

13. *Purkett*, 115 S. Ct. at 1770. "There were a total of four black persons available for selection as jurors, making up 14% of the venire. The government used two of its six strikes (33%) to eliminate two of the four black members of the venire. The defendant then used one peremptory challenge to strike one of the two potential remaining black jurors, so that the actual jury consisted of eleven whites and one black." *State v. Elem*, 747 S.W.2d 772, 774 (Mo. Ct. App. 1988).

14. *Purkett*, 115 S. Ct. at 1770.

15. *Id.* "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkept hair." *Id.* It is worth noting that the officer who arrested Elem on the night of the robbery described Elem as having "french braids" in his hair. *State v. Elem*, 747 S.W.2d at 773. Oddly, the prosecutor failed to mention this apparent similarity between Elem and juror 22 when explaining the challenge. *Id.*

16. *Id.* Jurors 22 and 24 were the only members of the jury panel with facial hair. *Id.* at 774.

17. *Id.*

18. *Id.*

Without explanation, the state trial court overruled Elem's objections and empaneled the jury.<sup>19</sup> The Missouri Court of Appeals, after considering the challenges under *Batson*, upheld the trial court's decision.<sup>20</sup> The court held that the prosecutor's explanation for the challenges constituted a legitimate "hunch" that failed to raise an inference of racial discrimination.<sup>21</sup>

Elem then filed a petition for writ of habeas corpus in federal district court asserting the unconstitutionality of the peremptory challenges and other claims.<sup>22</sup> Adopting a magistrate judge's report, the district court found factual support in the record for the Missouri courts' determination that there had been no purposeful discrimination.<sup>23</sup>

While acknowledging that the previous robbery incident was a sufficient reason for striking juror 24, the United States Court of Appeals for the Eighth Circuit reversed the district court on grounds that long hair, a mustache, and a beard were insufficient reasons for striking juror 22.<sup>24</sup> The Eighth Circuit explained that "neutral explanations" alone, even if facially legitimate, reasonably specific, and clear, failed to satisfy the *Batson* test.<sup>25</sup> The court held that where the prosecution strikes members of the defendant's race from the venire citing factors facially irrelevant to jury service qualification, there must be a plausible, race-neutral explanation of why those factors affect the person's ability to serve as a juror.<sup>26</sup>

In reversing the Eighth Circuit's decision, the United States Supreme Court held that the prosecutor's explanation for striking juror 22 focused on characteristics that were not peculiar to Elem's ethnic group and was therefore sufficiently nondiscriminatory.<sup>27</sup> Further, noting support in the record for the trial court determination that the explanation was not pretextual, the Supreme Court held that the *Batson* requirements were met.<sup>28</sup>

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19. *Purkett*, 115 S. Ct. at 1770.

20. *State v. Elem*, 747 S.W.2d at 774-75.

21. *Id.* at 775.

22. *Purkett*, 115 S. Ct. at 1770.

23. *Id.*

24. *Elem v. Purkett*, 25 F.3d at 682-83.

25. *Id.* at 683.

26. *Id.*

27. *Purkett*, 115 S. Ct. at 1771.

28. *Id.* at 1771-72.

### III. BACKGROUND

#### A. Supreme Court Decisions Prior to *Batson*

Shortly after the Civil War, the Supreme Court decided *Strauder v. West Virginia*,<sup>29</sup> which recognized that criminal defendants are protected against the discriminatory exclusion of members of their own race from the venire.<sup>30</sup> In *Strauder*, a black defendant sought to reverse his murder conviction by attacking a state statute limiting jury service to white males.<sup>31</sup> In a 7-2 decision, the Supreme Court reversed the conviction,<sup>32</sup> holding that denying blacks jury service violated equal protection principles recently ratified by the Fourteenth Amendment.<sup>33</sup>

Despite this right to jury service, exclusion of blacks from actual petit juries continued through more subtle means, including peremptory challenges.<sup>34</sup> The Supreme Court did not consider the discriminatory use of peremptory challenges, however, until it decided *Swain v. Alabama*<sup>35</sup> almost a century after *Strauder*.<sup>36</sup>

The Court may have been reluctant to question the use of discriminatory peremptory challenges for two reasons.<sup>37</sup> First, American jurisprudence recognized peremptory challenges as a time-honored tradition valued by both sides in criminal cases as an important element of fairness.<sup>38</sup> Second,

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29. 100 U.S. 303 (1879).

30. Cheryl A. O'Brien, Note, *Hernandez v. New York: Did the Supreme Court Intend to Overrule Batson's Standard of "Racially Neutral"?* 15 W. NEW ENG. L. REV. 315, 319 (1993).

31. *Strauder*, 100 U.S. at 304-05. The defendant claimed that exclusion of blacks from service on grand or petit juries denied him "the full and equal benefit of all laws" enjoyed by white defendants. *Id.* at 304 (quoting Defendant's pre-trial petition for removal to federal court). Further, the defendant claimed that exclusion of blacks from jury service greatly enhanced the probability that his rights would be denied more readily than would the rights of a white defendant. *Id.*

32. *Id.* at 312.

33. *Id.* at 307. "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Court questioned "how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" *Strauder*, 100 U.S. at 309.

34. Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 564.

35. 380 U.S. 202 (1965).

36. Brand, *supra* note 34, at 564.

37. Brand, *supra* note 34, at 564.

38. Brand, *supra* note 34, at 564-65. The Court in *Swain* noted that the "function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence

peremptory challenges constituted an integral part of the trial process, which most legal minds considered a paradigm of impartiality incapable of facilitating invidious racial discrimination.<sup>39</sup>

*Swain* involved a black defendant who appealed his rape conviction by arguing that the prosecutor's peremptory challenge of all six eligible black members from the venire violated his right to equal protection.<sup>40</sup> In rejecting this claim, the Supreme Court observed that peremptory challenges historically required neither explanation nor control by the court.<sup>41</sup> The Court also stated that prosecutors are entitled to the presumption that their strikes are based on acceptable considerations related to the case being tried, the defendant involved, and the crime charged.<sup>42</sup> Colorable Fourteenth Amendment claims arose only upon a showing that a prosecutor actively sought to strike peremptorily all qualified blacks from all juries.<sup>43</sup> The Court affirmed *Swain's* conviction because he failed to show that the prosecutor used peremptory challenges to exclude systematically blacks from jury panels over a period of time.<sup>44</sup>

So formidable was this burden of proof that, over the next twenty years, no lower court found that a criminal defendant sufficiently satisfied the *Swain* test.<sup>45</sup> The Supreme Court finally reconsidered *Swain* in 1986 when the Second Circuit Court of Appeals held that racially motivated peremptory challenges violated a criminal defendant's Sixth Amendment

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placed before them, and not otherwise." 380 U.S. at 219. See also *supra* note 1 and accompanying text for discussion about the history of peremptory challenges.

39. Brand, *supra* note 34, at 565.

40. *Swain*, 380 U.S. at 203-05.

41. *Id.* at 220-21.

42. *Id.* at 223; Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 27 (1993) [hereinafter Johnson, *The Language and Culture*].

43. *Swain*, 380 U.S. at 223. The Court stated that "when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance." *Id.* See also Johnson, *The Language and Culture*, *supra* note 42, at 28.

44. *Swain*, 380 U.S. at 227-28.

45. Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1658 & n.24 (1985) [hereinafter Johnson, *Black Innocence*] (citing *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); *United States v. Pearson*, 448 F.2d 1207 (5th Cir. 1971); *McKinney v. Walker*, 394 F. Supp. 1015 (D.S.C. 1974); *State v. Simpson*, 326 So. 2d 54 (Fla. Dist. Ct. App. 1976); *State v. Baker*, 524 S.W.2d 122 (Mo. 1975); *Ford v. State*, 530 S.W.2d 25 (Mo. Ct. App. 1975); *State v. Davis*, 529 S.W.2d 10 (Mo. Ct. App. 1975); *Ridley v. State*, 475 S.W.2d 769 (Tex. Crim. App. 1972)).

right to an impartial jury.<sup>46</sup> Thus, ground was tilled for the landmark *Batson v. Kentucky*.<sup>47</sup>

### B. *Batson* and its Progeny

*Batson* involved a black defendant convicted by an all-white jury after the prosecutor used peremptory challenges to exclude all four black members from the venire.<sup>48</sup> Although the defendant claimed violation of both his Sixth and Fourteenth Amendment rights, the Supreme Court based the decision solely on the equal protection claim.<sup>49</sup> Moreover, the Court little more than acknowledged the *Strauder* principle that discriminatory peremptory challenges violated a defendant's equal protection right to have members of his own race on the venire.<sup>50</sup> The Court placed greater emphasis on the equal protection rights of prospective black jurors that might be excluded peremptorily from petit juries and the damage such discrimination would cause to the entire community.<sup>51</sup>

Reversing the defendant's conviction, the Court held that the equal protection clause forbids prosecutors from challenging prospective jurors solely because of their race or on the assumption that black jurors will be unable to serve impartially at trials involving black defendants.<sup>52</sup> The Court clearly rejected the *Swain* presumption that black jurors will be biased in favor of black defendants.<sup>53</sup> *Batson* also obviated the need for defendants to prove systematic discrimination by prosecutors in establishing equal protection violations.<sup>54</sup>

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46. *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *cert. granted and judgment vacated*, 478 U.S. 1001 (1986). For further analysis of this case, see Johnson, *Black Innocence*, *supra* note 45, at 1663-66; Johnson, *The Language and Culture*, *supra* note 42, at 28-29. The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

47. 476 U.S. 79 (1986). See also Johnson, *The Language and Culture*, *supra* note 42, at 29.

48. 476 U.S. at 82-83.

49. *Id.* at 83-84. See also Johnson, *The Language and Culture*, *supra* note 42, at 29.

50. *Batson*, 476 U.S. at 86-87 (quoting *Strauder*, 100 U.S. at 308-09).

51. *Id.* at 87-89.

52. *Id.* at 89. See also Johnson, *The Language and Culture*, *supra* note 42, at 29.

53. Johnson, *The Language and Culture*, *supra* note 42, at 29-30. However, in concentrating on the Fourteenth Amendment rights of the jurors instead of the Sixth Amendment rights of defendants, the Court's decision in *Batson* "underplays prior rationales relating to the defendant's interest in non-racist determination of his guilt and exaggerates precedent related to juror rights and community interests." Johnson, *The Language and Culture*, *supra* note 42, at 32.

54. *Batson*, 476 U.S. at 92-93. The Court conceded that the *Swain* requirement that defendants provide "proof of repeated striking of blacks over a number of cases was . . . a

In replacing the prohibitive requirements of *Swain*, the Court fashioned a three-part test for determining when a prosecutor's peremptory challenges violate the equal protection clause.<sup>55</sup> Instead of proving systematic discrimination by the prosecutor over a long period of time,<sup>56</sup> an opponent suspecting biased peremptory challenges must first establish a prima facie case of racial discrimination in the case at hand.<sup>57</sup> To establish a prima facie case, the defendant must prove membership in a cognizable racial group<sup>58</sup> and show that the prosecutor peremptorily excluded members of the defendant's race from the jury.<sup>59</sup> From the facts and other relevant circumstances, the defendant must draw an inference that the prosecutor has used discriminatory practices in selecting the jury.<sup>60</sup>

If a prima facie case of discrimination is established, the burden of proof shifts to the proponent of the peremptory challenges to show that the challenges constitute race-neutral strikes and relate to the case to be tried.<sup>61</sup> Although this second step does not require as much explanation as a challenge for cause, the prosecutor cannot rebut the defendant's prima facie case by merely asserting a hunch that the challenged juror would be biased in favor of the defendant due to "shared race."<sup>62</sup> If the prosecutor tenders a race-neutral explanation related to the case at bar, the trial court undertakes the third step of the *Batson* test and decides whether the opponent of the strike has proved purposeful racial discrimination.<sup>63</sup>

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crippling burden" that made prosecutors' peremptory challenges "largely immune from constitutional scrutiny." *Id.*

55. *Id.* at 96-98.

56. *Id.* at 91-92. Indeed, "[a] single invidiously discriminatory governmental act" is not immunized by the absence of such discrimination in the making of other comparable decisions." *Id.* at 95 (quoting *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 n.14 (1977)).

57. *Batson*, 476 U.S. at 96. The Court emphasized that the burden of proof in an equal protection case is "on the defendant who alleges discriminatory selection of the venire to prove the existence of purposeful discrimination." *Id.* at 93 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967)).

58. *Id.* at 96 (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

59. *Id.*

60. *Id.* The Court invested trial courts with a great deal of discretion in evaluating the circumstances surrounding peremptory challenge controversies. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 96-97. The Court expressed "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." *Id.* at 97.

61. *Id.* at 97-98.

62. *Id.* at 97.

63. *Batson*, 476 U.S. at 98.



The Court further concentrated on the State's argument that restricting the use of peremptory challenges would "eviscerate" the fair trial protections they afford.<sup>64</sup> The Court stated that, despite the advantages of peremptory challenges in the justice system, the challenges often discriminate against black venirepersons in contravention of the equal protection guarantees in the Fourteenth Amendment.<sup>65</sup>

The Supreme Court soon extended the *Batson* rationale to other situations involving discriminatory use of peremptory challenges. In *Powers v. Ohio*,<sup>66</sup> the Court acknowledged the standing of a criminal defendant to object to discriminatory peremptory challenges regardless of his race.<sup>67</sup> In *Edmonson v. Leesville Concrete Co.*,<sup>68</sup> the Court extended the prohibition against racially discriminatory peremptory challenges to civil cases.<sup>69</sup> Although the Court in *Batson* specifically declined to address whether the Constitution limited a defendant's use of peremptory challenges, in *Georgia v. McCullom*,<sup>70</sup> the Court held that criminal defendants could not engage in racially discriminatory peremptory challenges.<sup>71</sup> More recently, the Court extended *Batson* to prohibit peremptory challenges motivated by gender discrimination in *J.E.B. v. Alabama ex rel. T.B.*<sup>72</sup>

Lurking among the post-*Batson* cases, however, lies *Hernandez v. New York*,<sup>73</sup> the first case to concentrate on the actual application of *Batson*.<sup>74</sup> In *Hernandez*, the Court clarified that protection against racially motivated peremptory challenges depends upon proof of discriminatory intent on the part of the prosecutor.<sup>75</sup> *Hernandez* involved a Latino defendant who appealed his conviction for attempted murder and weapon possession by claiming that the prosecutor exercised peremptory challenges to exclude Latinos from the jury.<sup>76</sup> In explaining the strikes, the prosecutor stated that

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64. *Id.*

65. *Id.* at 98-99.

66. 499 U.S. 400 (1991).

67. *Id.* at 415 ("To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.").

68. 500 U.S. 614 (1991).

69. *Id.* at 628. "Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Id.* (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979); *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

70. 505 U.S. 42 (1992).

71. *Id.* at 59.

72. 511 U.S. 127 (1994).

73. 500 U.S. 352 (1991) (plurality opinion).

74. *Id.* at 355 (plurality opinion). See also Johnson, *The Language and Culture*, *supra* note 42, at 52.

75. *Hernandez*, 500 U.S. at 359-60.

76. *Id.* at 355.

Latino jurors might not accept the interpreter's translation of testimony offered by Spanish-speaking witnesses.<sup>77</sup>

The Court upheld the conviction and specified that the defendant failed to establish that the prosecutor's strikes were motivated by either an intention to exclude Latino jurors or stereotypical assumptions about Latinos.<sup>78</sup> Both the plurality and concurring opinions deemed the prosecutor's explanation race-neutral because a factor other than race served as the basis for the strikes.<sup>79</sup>

Thus, six justices supported the assertion that a prosecutor's peremptory challenges are presumed to be race-neutral unless discriminatory intent is inherent in the prosecutor's explanation of the strikes.<sup>80</sup> In dissent Justice Stevens mentioned, but did not emphasize, the language in *Batson* requiring that a prosecutor's reason for striking prospective jurors be "legitimate," . . . and related to the particular case to be tried."<sup>81</sup> This language, however, constituted the main issue in *Purkett v. Elem*.

#### IV. REASONING OF THE COURT

Although brief by Supreme Court standards, the *Purkett* decision concisely distinguished the second and third steps of the *Batson* test.<sup>82</sup> In doing so, the Court emphasized the separation between the prosecutor's responsibility to articulate a race-neutral explanation for the peremptory challenge and the trial court's responsibility to decide whether the opponent of the challenge proved purposeful racial discrimination.<sup>83</sup>

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77. *Id.* at 356-57.

78. *Id.* at 361.

79. *Id.* at 361 (plurality opinion); 500 U.S. at 375 (O'Connor, J., concurring). In fact, Justice O'Connor authored her concurrence to voice concern that Justice Kennedy's opinion might require more justification by the prosecutor for strikes that had a disproportionate impact on particular racial groups. *Id.* at 372-73 (O'Connor, J., concurring). Justice O'Connor emphasized that Court precedent clearly rejected the proposition that a law or act, "without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Id.* at 373 (O'Connor, J., concurring) (emphasis in original) (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

80. *Hernandez*, 500 U.S. at 360. Justice Kennedy emphasized that the second step of *Batson* required only that the prosecutor's explanation for peremptory challenges be facially valid. *Id.* at 360.

81. *Id.* at 376 (Stevens, J., dissenting) (quoting *Batson v. Kentucky*, 476 U.S. 79, 98, & n.20 (1986)). Justice Stevens instead pursued the argument of whether disproportionate impact was sufficient to constitute an equal protection violation. *Id.* at 376-79 (Stevens, J., dissenting). Justice Blackmun's dissent likewise emphasized Justice Stevens's disproportionate impact argument. *Id.* at 375 (Blackmun, J., dissenting).

82. *Purkett*, 115 S. Ct. at 1771-72. See *supra* notes 53-64 and accompanying text for an explanation of the *Batson* test.

83. 115 S. Ct. at 1770-71.

Writing per curiam,<sup>84</sup> the Supreme Court found that the Eighth Circuit Court of Appeals erroneously combined the second and third steps by "requiring that the justification [for the challenge] tendered at the second step be not just [race]-neutral, but also at least minimally persuasive . . . ."<sup>85</sup> The Court clarified that the persuasiveness of the justification becomes relevant only when the trial court undertakes the third step of determining whether the opponent of the strike carried the burden of proving purposeful discrimination.<sup>86</sup> At that stage, the trial court decides whether the justification is so implausible, fantastic, or silly as to simply constitute a pretext for discrimination.<sup>87</sup> The Court reasoned that ending the *Batson* test at the second step would shift improperly the burden of persuasion regarding racial motivation away from the opponent of the challenge.<sup>88</sup>

The Court then interpreted the language in *Batson*, which requires a prosecutor to explain a peremptory challenge.<sup>89</sup> Specifically, the Court's comment in *Batson*, that the reason must be related to the case at bar, meant only that a prosecutor could not satisfy the burden of explanation by merely asserting good faith or merely denying any discriminatory motivation for the challenge.<sup>90</sup>

In dissent, Justice Stevens questioned the majority's wisdom in apparently altering the second step of *Batson* without first ordering full briefing or oral argument on the merits of Elem's case.<sup>91</sup> Justice Stevens insisted that the majority partially overruled *Batson* by essentially nullifying step two, which requires peremptory challenges to be trial related as well as race-neutral and reasonably specific.<sup>92</sup> If not directly related to the particular case to be tried, a prosecutor could easily adopt "rote"

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84. Per curiam is Latin for "by the Court," and is defined as "[a] phrase used to distinguish an opinion of the whole court from an opinion written by any one judge. Sometimes it denotes an . . . announcement of the disposition of a case by court not accompanied by a written opinion." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

85. *Purkett*, 115 S. Ct. at 1771 (citing *Elem v. Purkett*, 25 F.3d 679, 683 (8th Cir. 1994)).

86. *Id.* (citing *Batson*, 476 U.S. at 98; *Hernandez*, 500 U.S. at 359 (plurality opinion)).

87. *Id.*

88. *Id.* (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)).

89. *Id.*

90. *Purkett*, 115 S. Ct. at 1771. See also *Hernandez*, 500 U.S. at 359-60; cf. *Texas Dept. Of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) ("The explanation provided must be legally sufficient to justify a judgment for the defendant.").

91. *Purkett*, 115 S. Ct. at 1772 (Stevens, J., dissenting).

92. *Id.* at 1774 (Stevens, J., dissenting) (citing *Batson*, 476 U.S. at 98).

neutral explanations that, while facially legitimate, conceal discriminatory intent.<sup>93</sup>

## V. SIGNIFICANCE

The per curiam nature of *Purkett v. Elem* initially left commentators guessing about the majority's message. Some interpreted the decision as signaling a present unwillingness by the Court to further extend the protections in *Batson*.<sup>94</sup> Still others felt that the manner of the decision might simply indicate the Court's view that *Purkett* had not been a particularly important case.<sup>95</sup>

Practitioners were quick to look past the manner of the decision and focus on the holding itself.<sup>96</sup> In the eyes of one defense lawyer, the *Purkett* decision heightened the criminal defendant's burden of proving intentional discrimination to the extent that *Batson* protections would be contingent on proving "what's in the prosecutor's mind."<sup>97</sup> Prosecutors, on the other hand, hailed *Purkett* as a "restate[ment]" of the basic principles behind traditional peremptory challenges, which required no explanation whatsoever.<sup>98</sup>

In deferring analysis of peremptory challenges until the third step of *Batson*, however, the greatest impact of *Purkett* must surely be felt by the trial court.<sup>99</sup> In the view of one local jurist, *Purkett* definitely weakens *Batson*.<sup>100</sup> Although *Purkett* emphasized the trial court's discretion in determining purposeful discrimination, it failed to provide any "real guidelines for weighing a *Batson* objection."<sup>101</sup>

In view of every post-*Batson* decision except *Hernandez*, *Purkett* must be considered a colossal step backward for equal protection. In fact, the

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93. *Id.* at 1773 (Stevens, J., dissenting) (quoting *State v. Antwine*, 743 S.W.2d 51, 65 (Mo. 1987) (en banc)).

94. Marcia Coyle, *Justices Come Up for Air on Juror Strikes*, NAT'L L.J., May 29, 1995, at A14.

95. Paul M. Barrett, *Supreme Court Gives Prosecutors More Leeway in Challenging Juror*, WALL ST. J., May 16, 1995, at B4.

96. Richard C. Reuben, *Excuses, Excuses*, A.B.A. J., Feb. 1996, at 20.

97. *Id.* (quoting Gary Buichard, a public defense lawyer from Atlanta). Mr. Buichard further asserted that, "[u]nless you have a prosecutor who messes up badly, you're never going to get that kind of proof." *Id.*

98. *Id.* (quoting Kent Scheidegger, "legal director for the pro-prosecution Criminal Justice Legal Foundation in Sacramento, California").

99. Interview with Hon. William R. Wilson Jr., United States District Court, Eastern District of Arkansas, in Little Rock, Ark. (Mar. 18, 1996).

100. *Id.*

101. *Id.* "We'll have to wait and see," Judge Wilson continued, "but I suspect, as a practical matter, *Batson* has been overruled." *Id.*

Court's reasoning in *Purkett* almost mirrors the reasoning in *Strauder v. Virginia*. Both decisions ostensibly champion principles of equal protection while simultaneously making those principles vulnerable to judicial abuse.

Although *Strauder* prohibited exclusion of blacks from the venire, it took almost a century, and *Swain v. Alabama*, for the Court to prohibit discriminatory peremptory challenges that excluded blacks from petit juries. One reason for this delay may have been overconfidence in judicial administration of equal protection.<sup>102</sup> Recognition of this overconfidence is apparent in the *Swain* test and its extra-judicial means for determining the existence of equal protection violations.<sup>103</sup>

In *Purkett* the Court suffers from the same overconfidence in the judiciary. Without guidelines to determine when a prosecutor's explanation is actually a pretext for intentional discrimination, a criminal defendant bears the heavy burden of producing evidence of the prosecutor's discriminatory state of mind. This standard is arguably equivalent to that necessary under the prohibitive *Swain* test.<sup>104</sup>

A foreshadowing of *Purkett*'s troublesome potential lies within Justice Marshall's *Batson* concurrence.<sup>105</sup> While agreeing that racially discriminatory peremptory challenges violate equal protection, Justice Marshall cautioned the Court to be careful in setting the criteria by which lower courts should determine discriminatory intent.<sup>106</sup> Due to their own "conscious or unconscious racism," judges themselves may accept such explanations as sufficient.<sup>107</sup>

Prophetically, Justice Marshall noted that, even after a century of equal protection, the face of racial discrimination in the United States had changed very little.<sup>108</sup> It is difficult to believe that society or the judiciary has made sufficient progress since 1986 to warrant a return to the idealistic, yet unrealistic, rule in *Strauder*. Unfortunately, such is the reasoning of *Purkett*.

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102. See Brand, *supra* note 34; see also *supra* notes 37-39 and accompanying text.

103. See *supra* note 43 and accompanying text for explanation of the *Swain* test.

104. See *supra* note 43.

105. *Batson*, 476 U.S. at 102-08 (Marshall, J., concurring).

106. *Id.* at 105-07 (Marshall, J., concurring). Justice Marshall noted that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Id.* at 106 (Marshall, J., concurring).

107. *Id.* (Marshall, J., concurring).

108. *Id.* at 106-07 (Marshall, J., concurring). "It is worth remembering that 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole." *Id.* (Marshall, J., concurring) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986)) (quoting *Rose v. Mitchell*, 443 U.S. 545, 558-59 (1979)).

Both cases exalt an equal protection right in name only because the remedy provided is now practically unattainable.

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